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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 761

NATIONAL THEATRES CORPORATION, *Petitioner,*

v.

BERTHA BUILDING CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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April 4, 1958.

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The respondent Bertha Building Corporation opposes the grant of the petition for a writ of certiorari in this case since the judgment below is clearly correct, presents no novel or important question of federal law, and involves no conflict of decision.

QUESTION PRESENTED

The only relevant question presented is whether the respondent was entitled to a jury trial in a federal

court on contested issues of material fact relating to petitioner's affirmative defense of the statute of limitations.

STATEMENT OF THE CASE

The proceedings below were confined to a separate trial of the issues raised by petitioner's affirmative defense that respondent's complaint under the anti-trust laws was barred by the California statute of limitations. That trial was held by Judge Galston alone despite respondent's repeated requests for a jury trial as to the contested issues of material fact arising out of that plea.

The sole question to be determined at the trial was whether the petitioner had met its burden of establishing that the cause of action was barred by the California three-year limitations statute. To meet that burden, it was incumbent upon petitioner to prove that it had been present openly, notoriously and continuously in California throughout the entire three-year period after the cause of action accrued. Sec. 351, Cal. Code of Civil Proc.

During the course of the trial, conducted without a jury, respondent introduced various pleadings and portions of sworn testimony which petitioner had offered and which had been admitted in prior judicial proceedings in California. These pleadings and testimony were to the effect that petitioner had not been present in California in that it had never done business and had never had an office or agent in that state and hence had never been subject to the jurisdiction of courts sitting in California.

Thus on at least thirteen different occasions, in lawsuits brought against it in California, petitioner for-

mally challenged the jurisdiction of courts in that state and denied that it was present in California or that it had been doing business there. R. 17a-48a, Res. Exs. 3, 7-17, 26. Typical of the many statements to this effect was the affidavit dated September 26, 1932, by L. A. Woolams, the then vice-president of petitioner. Res. Ex. 3. In that affidavit, filed in the case of *Jensen* v. *Wesco Corp.*, in the Superior Court of the State of California, Woolams stated under oath that petitioner did not have "any employee or employees or managing agent or any other person located in the State of California," that no employee, agent or representative "transacted or engaged in or did any business in the State of California for or on behalf of said corporation," and that petitioner "was not engaged and is not now engaged in doing any business of any sort or nature in said state." To the same effect was petitioner's answer filed twenty years later, in 1952, in response to an anti-trust action brought against it in a federal court in California (*Levy* v. *Paramount Pictures, et al.*, Res. Ex. 10). Petitioner there alleged:

> "To and including the time of filing this answer said defendant has not had, and does not have, an office in the State of California nor has it engaged in or conducted, nor does it conduct or engage in, any business in the State of California, it has never qualified to do business in the State of California and it has never consented to be sued in the State of California, or resided, or been found, or been present or had any agent in the State of California."

Petitioner now contends (petition, p. 14) that these statements were merely made "for tax purposes"; in other words, that its allegations and sworn testimony were nothing more than parts of a scheme to avoid the

payment of state franchise and other local taxes in California, R. 215a, which scheme was successful in that petitioner concededly paid no taxes to California for a period of at least twenty years, R. 150a.

The factual dispute over petitioner's presence in California was further highlighted at the trial by admissions from one of petitioner's own witnesses that petitioner had no office in California and had no listed telephone during the relevant period after 1930. R. 205a. He further admitted that the petitioner had been an entity separate and distinct in its business from that of its subsidiaries and affiliates. R. 224a-225a. And a federal marshal, attempting to serve a summons in May 1947 upon the petitioner, was forced to certify on the return that after "diligent search" he had been unable to find petitioner "within my said District," the Southern District of California (which was the only California district in which the petitioner, even in its about-face in this case, seriously claimed to have been present). R. 214a, Res. Ex. 24.

The District Court at the trial, however, permitted the petitioner to import concepts of venue under the federal anti-trust laws as part of its proof that it was present in California within the meaning of Section 351 of the California Code of Civil Procedure, containing the tolling provision of that state's statute of limitations. On the basis of these concepts, the court held in effect that the California statutory element of "presence in the state" was established as a matter of law by evidence that it would have been theoretically possible for a hypothetical judge in California to have found that venue under the Clayton Act would have been proper as to petitioner in California from July 4, 1935, to July 20, 1938.

The trial court thus interpreted the California limitations statute in complete disregard of the pertinent state law. It read that statute as if the *only* requirement for avoiding the effect of the tolling provisions was for the petition to establish that venue under the federal anti-trust laws could have been properly laid as to petitioner in California. Upon such reasoning, the District Court held that the limitations plea should be sustained and the complaint dismissed.

The Court of Appeals reversed the action of the District Court. It held that the only question presented was whether the action was barred by the California statute of limitations, a question which was not to be treated as merely one of venue. As to that question, the respondent was held entitled to a trial by jury since the limitations defense tendered genuine issues of fact. In the words of the Court of Appeals:

> "Inherent in that issue is the resolution of disputed questions of fact involving decision as to the credibility of witnesses and the need to weigh the evidence of National to the effect that it was doing business in the Southern District of California, now that it is to its advantage to take such a position, against its repeated allegations to the contrary in prior suits brought against it when it was to its advantage to take a stand diametrically opposed to what it is now attempting to prove. And it should not be forgotten that decision must be made in the light of fact findings as to many matters peculiarly within the knowledge of those in charge of the affairs of National during the critical period; and as to many occurrences which may seem to have chameleonic attributes when interpreted, or explained. * * *
>
> ". . . However that may be, its admissions that it did no business in California and had no agents

> there during the relevant period should, we think, make it perfectly clear that there were genuine issues of fact which could not properly be taken from the jury; that it was erroneous to refer such issues to Judge Galston for trial without a jury."

In its opinion on rehearing, the Court of Appeals reiterated that "the crucial question was whether the three-year California statute had run, as we correctly stated in the opening paragraph of our original opinion" and that "since the question of tolling in California presents substantial fact questions the Bertha case must be reversed and remanded for trial by jury on the limitations question."

ARGUMENT

Petitioner seeks to deny respondent its constitutional right to a jury trial on contested factual issues arising out of a limitations plea by so masking and so camouflaging the limitations issue as to make it appear to be nothing more than an issue of venue and jurisdiction. Indeed, the petition herein, on analysis, is nothing more than an attempt to distort the single, basic issue involving the tolling provisions of the California limitations statute into another and completely different issue of venue and jurisdiction under Sections 4 and 12 of the Clayton Act.

The petition throughout ignores the vital consideration that the defense of limitations turns not on an application of federal venue statutes but on the application of the statutes of the State of California suspending the running of the statute of limitations in favor of any defendant while such defendant is "out of the state"; and that under the controlling requirements of the state law of California, it is incumbent

upon a defendant foreign corporation in the position of this petitioner to make a showing of certain elements, separate and distinct from venue, in order to avoid the effect of the provisions of the California state law suspending the running of the California statute of limitations.

I. The Court of Appeals correctly applied the well-settled rule that a jury trial is a matter of right as to contested factual issues involved in a limitations plea.

The decision below was to the effect that petitioner's defense based upon the California statute of limitations is triable as of right by a jury since genuine issues of material fact concerning petitioner's activities in California are in dispute. In so holding, the court below was merely applying the long-settled rule that questions of material fact raised by the defense of the statute of limitations are triable as of right by a jury rather than by a court alone. *Michigan Insurance Bank* v. *Eldred*, 130 U.S. 693, 699 (1889); *Jelliffe* v. *Thaw*, 67 F. 2d 880, 882 (C.A. 2, 1933); *Stornelli* v. *U.S. Gypsum Co.*, 134 F. 2d 461 (C.A. 2, 1943); *Don George, Inc.* v. *Paramount Pictures*, 111 F. Supp. 458, 471 (W.D., La., 1951). That decision is so obviously correct and devoid of conflict with other decisions as to warrant denial of the petition for a writ of certiorari.

The applicability of this well-established rule to this case is at once clear. The basic problem at stake was whether the cause of action was barred by the California three-year limitations statute. The determination of that problem required the resolution of a number of disputed questions of fact. Among the questions of fact involved were the nature and extent of petitioner's activities, if any, in California during the relevant period. Had the petitioner been doing

business in California continuously during the three-year period? Had its presence there, or that of its officers, been open and notorious, or secret and clandestine? The answers to these questions depended in large part upon the credibility of witnesses who testified in these respects. Much also depended upon the significance and credence to be given to the solemn and deliberate representations made by petitioner in various court proceedings over many years that it had never transacted or carried on business or been found in California during the relevant period. There was thus a large task for the fact finder or arbiter of disputed facts. There was, in short, a need for a jury.

As the Court of Appeals stated (248 F.2d at 836), petitioner's admissions in the prior judicial proceedings that it "did no business in California and had no agents there during the relevant period should, we think, make it perfectly clear that there were genuine issues of fact which could not properly be taken from the jury; that it was erroneous to refer such issues to Judge Galston for trial without a jury." The controversial nature of those admissions, warranting a jury trial, cannot be doubted.

Nor do any of the factual considerations advanced in the petition for certiorari (pp. 12-14) free this case from the category of those warranting a jury trial upon demand. The facts with respect to the activities in California of petitioner's subsidiaries and of petitioner's general managers were all the subject of dispute and doubt. And the fact that the District Court made findings in those respects which were not labeled clearly erroneous by the Court of Appeals does not negate the highly controversial nature of the findings or the underlying facts. The

findings of the District Court simply reflected the trial judge's view as to the preponderance of the disputed evidence; there was no indication that the findings rested on uncontroverted evidence.

The very existence of controversy as to the facts and the need for weighing the credibility of witnesses and documents in this case demonstrate conclusively that the Court of Appeals properly held that the elements justifying a jury trial were present. This case, in other words, involves no more than an application of a well-settled principle as to jury trial to the particular facts of this proceeding. As such, the case presents no novel or important principle warranting review by this Court.

2. The Court of Appeals correctly held that the application of the California limitations statute is not to be treated as merely a problem of venue.

In urging that respondent was not entitled to a trial by jury, petitioner advances the claim that the issue to be determined was merely one of venue. Thus, in the first of its "Questions Presented" (petition, page 2), petitioner inserts the false postulate that the defense of limitations turns "solely upon the question of whether defendant could have been sued in California under the venue and jurisdiction provisions of Sections 4 and 12 of the Clayton Act". This erroneous premise is restated and repeated over and over again by distortions and misstatements in the balance of petition,[1] as, for instance, on page 6, where it is said:

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[1] For instance, it is inaccurate for petitioner to claim (petition, pp. 5, 16) that respondent's complaint affirmatively alleged that petitioner was present in California in view of the fact that Paragraph XII of that complaint contains the following in subpara-

"Whether the California statute of limitations barred plaintiff's claim against petitioner turned upon one issue and only one issue, namely, could petitioner have been sued in California during the relevant periods under the Clayton Act. The decision on the limitations defense followed from the decision on the venue issue."

That statement and the others to like effect throughout the petition are, of course, simply not true.

The pertinent California decisions establish that even if it were proper to import the federal venue concept of "transacting business" into the California statute of limitations to show petitioner's "presence" in California, that would in any event not suffice of itself to enable petitioner to avoid the effect of the California provisions suspending the running of the California statute of limitations.

California requires that in order to avoid the effect of its statute suspending the running of the period of limitations, the party pleading the defense of limitations has the burden of proving each and all of the following three elements:

(1) that the defendant was present in the state;

(2) that his presence was continuous for the statutory period required; and

(3) that his presence was open and notorious, not secret and clandestine.

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graph 3: "Since this cause of action accrued, the defendants were out of the State of California and up to the time of the filing of this complaint have never transacted any business or had any office or agent in the State of California and were not to be found there and have never designated any agent for the service of process upon them in the State of California and have never been subject to the service of process in that state."

It is not enough merely to prove the single element that the defendant was "present" and that his "presence" was continuous for the statutory period. California requires further proof that defendant's presence in the state for the required period was "(3) open and notorious, not secret and clandestine."

Thus in *Lawrence* v. *Ballou*, 50 Cal. 259 (1875), the California Supreme Court, at page 264, listed as the conditions under which a foreign corporation, such as petitioner, would be considered "within the state within the intent of the statute of limitations," so as to be able to "claim the benefits of the statute": (1) that the foreign corporation have a "managing agent in this state;" who was (2) "exercising openly his authority as such and without fraudulent concealment;" and (3) had "exercised his functions here continuously for the period fixed by the statute of limitations." See also *Palmer* v. *Shaw*, 16 Cal. 93 (1860); *Stewart* v. *Stewart*, 152 Cal. 162, 92 Pac. 87 (1907).

It is obvious from the foregoing that there is no necessary correlation between venue under the Clayton Act and tolling the California limitations statute. Considerations of fairness and convenience in subjecting a defendant to trial in a particular forum (factors irrelevant to an application of the state limitations statute), would be paramount in resolving the issue of venue. Conversely, questions as to open and notorious presence in the state and open and notorious exercise of authority in the state by agents acting as such without fraudulent concealment, which are crucial on the issue of the tolling of the California limitations statute, are not decisive in determining venue and jurisdiction under

the Clayton Act. Thus jurisdiction and venue under the Clayton Act might well have been proper in California as to petitioner on any particular day a complaint might have been filed during the relevant three-year period. But unless it could be proved that petitioner's officers or agents were present continuously in California throughout the entire three-year period, and in an open and notorious fashion, the California limitations statute would not have been tolled and would not bar the action. In other words, federal anti-trust concepts of venue and jurisdiction relate at best only to the first of the three critical elements necessary to avoid the tolling provisions of the California limitations statute, the element of presence within the state.

Nothing in this Court's decision in *United States* v. *Scophony Corp.*, 333 U.S. 795 (1948), or in the other decisions cited by petitioner, justifies any importation of the venue concepts under the Clayton Act into the interpretation and application of a state statute of limitations. Nor is there anything in those decisions providing any excuse for denying to respondent its basic and constitutional right to a jury trial as to disputed factual issues arising out of the limitations plea. Indeed, the *Scophony* decision was intended to prevent corporations from escaping liability for their anti-trust wrongs by raising technical objections to venue. It would seem a tragic perversion of that decision if the petitioner were now permitted to use it to accomplish the very escape from liability which this Court intended to block.

2. The statements of the Court of Appeals regarding Rule 41(b) raise no reviewable issue in any way related to the right to a jury trial on contested factual matters.

Petitioner seeks further a review of the statement below that if petitioner's limitations plea had been sustained "the resulting judgment of dismissal operates as a final adjudication of the merits of the controversy," whereas a decision as to venue "of course leaves the plaintiff free thereafter to seek an adjudication on the merits of his claim. F.R.C.P. 41(b)." Petitioner's claim, in other words, is that a judgment of dismissal sustaining a limitations plea is not an adjudication on the merits and that "the most [sic] respondent is entitled to is an order of dismissal" (p. 20 of petition) without prejudice so that it might bring an action in some other jurisdiction where limitations had not run.[2]

The short answer is that, since the court below held that the judgment of dismissal was improperly entered and that respondent was entitled to a jury trial on the limitations issue, the effect of a judgment of dismissal is presently immaterial. Additionally, petitioner is in no position to question the propriety of such an order on the ground that it might have been too prejudicial to respondent. Respondent alone could make such an attack, but only after such an order had become final. Only then would a question as to the impact of a final order of dismissal be ripe for consideration by this Court.

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[2] It has been conceded that actually there is no longer available to respondent any other jurisdiction where limitations does not bar the action. Thus, regardless of Rule 41(b), Judge Galston's erroneous ruling would have had for all practical purposes the same effect as an adjudication on the merits.

In any event, the question as to the effect of Rule 41(b) on an order of dismissal in these circumstances is in no way determinative of respondent's right to a trial by jury on contested factual matters. The remarks of the Court of Appeals relative to Rule 41(b) were at most dicta and were unnecessary to its decision.

Moreover, the decision as to the effect of such an order was clearly correct. Under Rule 41(b) a dismissal "other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." Since the dismissal here was based upon the limitations plea and was not one "for lack of jurisdiction or for improper venue," it is obvious that the dismissal would operate "as an adjudication upon the merits." See *American National Bank & Trust Co.* v. *United States*, 142 F. 2d 571 (App. D. C., 1944). Only if the order had expressly stated that it was "without prejudice" could it have avoided being an adjudication upon the merits. No such express statement appeared in the District Court's order of dismissal in this case and hence it must be treated as an adjudication upon the merits. The authorities cited by petitioner on page 20 of the petition are not to the contrary. And petitioner's reliance on the decision in *Warner* v. *Buffalo Drydock Co.*, 67 F. 2d 540 (C.A. 2, 1933) is misplaced, that decision having been rendered long prior to the adoption of Rule 41(b) by the same court which adjudicated this case. Finally, none of these cited cases or Rule 41(b) was intended in any way to limit or modify the right to a jury trial on contested factual issues.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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